Supreme Court, U.S.
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No. 03-___

In The

Supreme Court of the United States

JOHN FOUNTAIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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August 9, 2004

QUESTIONS PRESENTED

1. Whether the federal wire fraud statute (18 U.S.C. § 1343) authorizes criminal prosecution of an alleged fraudulent scheme to avoid payment of taxes potentially owed to a foreign sovereign, given the lack of any clear statement by Congress to override the common law revenue rule, the interests of both the Legislative and Executive Branches in guiding foreign affairs, and this Court's prior rulings concerning the limited scope of the term "property" as used in the wire fraud statute.

2. Whether Mr. Fountain is procedurally barred from challenging this conviction in a motion under Section 28 U.S.C. § 2255

PARTIES TO THE PROCEEDING

The Petitioner in this Court is John Fountain. The Respondent is the United States of America.

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PETITION FOR CERTIORARI

The Petitioner, John Fountain, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming Mr. Fountain's conviction (Appendix A) is reported at 357 F.3d 250 (2d Cir. 2004). The opinion of the district court denying Petitioner's 2255 motion (Appendix B) is unreported. The order of the court of appeals denying Mr. Fountain's petition for rehearing and rehearing *en banc* is attached as Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2004. Mr. Fountain petitioned for a rehearing, which was denied on June 1, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 18 United States Code Section 2343, which states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property means of false or fraudulent pretenses, representation, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate of foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years or both.

STATEMENT OF THE CASE

_____In 1997, a federal grand jury in the Northern District of New York returned a multi-count indictment charging a number of individuals, including Mr. Fountain, on Conspiracy to Engage in Money Laundering, wherein the specified and unlawful activity was the allegation that they had engaged in a wire fraud scheme in violation of 18 U.S.C. § 1343 to defraud the Canadian Government

of tax and duty revenue. (the "*Miller*" indictment"). A companion prosecution of other individuals on the same ground had been commenced in 1996 (the "*Trapilo/Pierce* indictment"). Specifically, the *Miller* indictment alleged that the defendants had brought tobacco and liquor products from the United States to Canada through the St. Regis Mohawk Indian Reservation "to avoid the payment of duties and taxes levied upon the implication of tobacco and liquor products by Canada."

The defendants in the *Trapilo/Pierce* indictment moved to dismiss the indictment on the ground that the prosecution violated the Revenue Rule. The District Court for the Northern District of New York (Pooler, J.) agreed and dismissed the indictment. The second circuit reversed, holding that the Revenue Rule did not preclude a wire fraud prosecution on such basis. *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997).

In 1998, the defendants in the *Miller* indictment likewise sought dismissal of the indictment. However, the District Court, relying upon *Trapilo*, ruled that the defendants' argument on the Revenue Rule had been foreclosed. *United States v. Miller*, 26 F.Supp.2d 415, 430 (N.D.N.Y. 1998). Mr. Fountain entered a plea of guilty. His counsel did not appeal.

Thereafter, Mr. Fountain filed a motion pursuant to 28 U.S.C. § 2255 to vacate and set aside this sentence in part based on this Court's opinion in *Cleveland v. United States*, 531 U.S. 12 (2000). On March 24, 2003, the district court denied Mr. Fountain's motion. The district court held that Mr. Fountain was not procedurally barred from raising a claim of ineffective assistance of counsel, provided that Mr. Fountain's arguments were

meritorious and existed at the time that he could have appealed. The district court ruled that the arguments could have been raised on direct appeal, but ruled against Mr. Fountain on the merits of his claims. The district court granted a Certificate of Appealability to the United States Court of Appeals for the Second Circuit.

The United States Court of Appeals for the Second Circuit issued an Opinion dated January 26, 2004 wherein the court agreed that Mr. Fountain's petition for habeas corpus should be denied. In regard to the claim that Mr. Fountain had been rendered ineffective assistance of counsel by the failure of trial counsel to pursue an appeal on the ground that the common-law revenue rule barred its conviction, the Second Circuit stated that it need not determine whether his trial attorney had been deficient in his performance. Under the Second Circuit's ruling in *R.J. Reynolds*, Mr. Fountain, according to the Second Circuit, had not been prejudiced, in that the Second Circuit had distinguished in *R.J. Reynolds* between civil suits and criminal actions involving the revenue rule. *Fountain*, 357 F.3d at 254-55. "Because Fountain would not be able, under *Trapilo*, to invoke the revenue rule to invalidate his criminal conviction, he was not prejudiced by his attorney's failure to raise this defense on appeal." The three-judge panel acknowledged, in a footnote, that it could not overrule the law of the Second Circuit as expressed in *Trapilo*, in that the panel was "bound by prior precedent of this Court unless it is overturned *in banc*."

In regard to the question of whether Mr. Fountain was actually innocent of the crime charged, the Second Circuit held that, under this Court's decision in *Cleveland* "taxes remained property within the purview of the mail and wire fraud statutes. . . ." The Second Circuit

acknowledged that money or property must be the object of the scheme to defraud. *Id.* at 255. The court stated that courts have construed the "property" requirement liberally. *Id.* at 256. When interpreting this Court's decision in *Cleveland*, the Second Circuit focused on the distinction between whether a tax is regulatory or revenue enhancing. *Id.* at 256-57. The court distinguished between a liquor license, which may not constitute property in the hands of the state, from "sales taxes that the government can anticipate collecting from transactions and alcohol. . . ." *Id.* "In general then, tax is owed to the government - even if not yet collected - are property in the hands of the government." As such, the Second Circuit denied Mr. Fountain's petition for a writ of habeas corpus. Moreover, the court denied his petition for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THIS PETITION

I. THIS COURT IS PRESENTLY DETERMINING THE PRINCIPAL ISSUE RAISED HEREIN IN THE CASE OF *UNITED STATES V. PASQUANTINO*

This Court is about to decide the issue raised by Mr. Fountain herein in the case of *United States v. Pasquantino*. This Court granted certiorari in said case from the decision en banc of the United States Court of Appeals for the Fourth Circuit reported at 366 F.3d 321 (4th Cir. 2003). The granting of certiorari in *Pasquantino* demonstrates the merit to the issue raised herein and as such should compel this Court to likewise grant certiorari to Mr. Fountain in this case. If this Court should agree with the Petitioners in *Pasquantino* that the wire fraud statute does not extend to a scheme to defraud the Canadian Government of an unadjudicated claim to

taxes, then Mr. Fountain's conviction should likewise be reversed.

II. THERE IS A CLEAR AND WELL-DEVELOPED CONFLICT OF AUTHORITY AMONG THE UNITED STATES COURTS OF APPEALS REGARDING THE PROPER SCOPE OF SECTION 1343 IN LIGHT OF THE REVENUE RULE

a. The underpinnings of the Conflict

i. The Revenue Rule

Recognized for hundreds of years by the United States and most foreign governments, the revenue rule is a principle of common law holding that the courts of one sovereign do not give effect to the revenue laws of another sovereign. *See e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 7 40 n. 3 1988) (Brennan, J., concurring) noting the rule's continues existence in the nation-to-nation setting); *Banco Nacional de Cuba v. Sabbation,* 376 U.S. 398, 413-414 (1964) ("[A] court need not give effect to the penal or revenue laws of foreign countries."); *Oklahoma v. Gulf, Colo. & Santa Fe Ry. Co.*, 220 U.S. 290, 299 (1911) ("The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statues for the protection of its revenue or other municipal laws, and to all judgments for such penalties.") (quoting *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 290 (1888), overruled in part by *Milwaukee County v. M.E. White Co..*, 296 U.S. 268, 278 (1935)). Over the centuries, the rule has received numerous

formulations of varying breadth and force, ranging from categorical refusal to take any notice of a foreign nation's revenue laws, to the narrower statement that "one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim." *United States v. First Nat'l City Bank*, 321 F.2d, 14, 23-24 (2d Cir. 1963). Even in courts where a narrower formulation has been used, there has generally been an understanding that the rule is not limited to attempts at direct enforcement of foreign revenue judgments or claims, but applies as well to actions brought under domestic law that would have the same effect. *See, e.g., Attorney General of Canada v. R. J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 131 (2d Cir. 2001) (holding that a civil RICO suit predicated on claims of wire fraud aimed at defrauding Canada of revenue was "in essence an indirect attempt to have a United States court enforce Canadian revenue laws, an exercise barred by the revenue rule."), *cert denied*, 537 U.S. 1000 (2002). *See also United States v. Harden,* [1963] S.C.R. 366, 371 (Can.) rejecting the enforcement of a stipulation of settlement of a tax case based on the "special principle that foreign States cannot directly or indirectly enforce their tax claims [in our courts]" (quoting, Taylor, A.C.at 515); *Stringam v. Dubois*, [1993] 3 W.W.R. 273, 282-83 (Alta.Ct.. App.) (barring claim of estate executor to compel sale of Canadian property because sale proceeds would be used to satisfy American estate taxes); Felix D. Strebel, *The Enforcement of Foreign Judgements & Foreign Public Law*, 21 Loy.L.A. Int'l & Comp. L.J. 55, 75 (1999) (reviewing Canadian cases which hold that "it is a well-established rule of public policy that Canadian law forbids a foreign state from suing, either directly or indirectly, in Canada for taxes alleged to be due to the state"). *See e.g., Government of India v. Taylor,* [1955] A.C. 491, 508 (H.L.) ("We proceed

upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries: it is sometimes, not happily perhaps, called a rule of private international law: it is at least a rule which is enforced with the knowledge that in foreign countries the same rule is observed."); *State of Colorado v. Harbeck*, 232 N.Y. 71, 85, 133 N.E. 357 (1921) ("The rule is universally recognized that the revenue laws of one state have no force in another."); Planche v. Fletcher, *99* Eng. Rep. 164, 165 (K.B. 1779) (Lord Manfield) ("One nation does not take notice of the revenue laws of another."); *Holman v. Johnson* 98 Eng. Rep. 1120, 1121 (K.B. (1775) (Lord Mansfield) ("For no country ever takes notice of the revenue laws of another."). In this Court, the United States has taken the position that [t]he revenue rule is a long established and widely accepted principle of the common law under which courts of one sovereign will not enforce the tax judgments and unadjudicated tax claims of another sovereign." Brief for the United States as Amicus Curiae, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, S.Ct. Case No. 01-1317 at 7 (October. 2002). "[N]umerous domestic and foreign courts have applied the rule to bar claims that, *in substance*, seek to enforce foreign revenue laws." *Id.* at 8 (emphasis added); *see also* Brief of the National Association of Manufacturers and United States Chamber of Commerce as Amici Curiae in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 2d Cir. Case No. 00-7972 (February. 5, 2001) (Theodore B. Olson, Counsel of Record) ("It is beyond dispute that the Revenue Rule has been consistently applied in the international community. In fact, no court has failed to apply the rule when asked to give effect to the revenue laws of a foreign sovereign.").

As with most longstanding common law doctrines, courts invoking the revenue rule have articulated various rationales for its existence. All of them, however, rest ultimately on the principle that while courts are generally willing to vindicate the private rights of individuals within their jurisdiction, and will sometimes apply foreign law in doing so, penal laws – of which revenue laws are a subset – are understood to be different in nature. Such laws embody the political will of a particular sovereign and enforce obligations imposed on individuals by fiat, often for purely political ends. This is particularly true of revenue laws, whose most basic object is appropriation of the resources a state regards as necessary to maintain its existence and pursue its interests. At the same time, revenue laws are frequently used to further various other state policies particular to the sovereign enacting them, such as maintenance of an ideologically desirable distribution of wealth, enforcement of political and moral judgments about certain persons, activities or products, *See Taylor*, [1955] A.C. at 511 ("[A] claim for taxes is but an extension of the sovereign power which imposed the taxes, and . . . an assertion of sovereign authority by one State within the territory of another . . . is (treaty or convention apart) contrary to all concepts of independent sovereignties."). and advancement of the state's perceived industrial and commercial interests. The revenue rule reflects a widespread recognition that the extent to which one nation will assist another nation in pursuing these types of policies is a matter properly decided by those to whom the treaty power is entrusted, not by normal operation of the court system. For courts to accept adjudication of such matters would routinely put them in the position of passing on the validity and construction of another nation's revenue laws and determining whether the policy judgments they embody were sufficiently compatible with those of our own

political system to be enforced. *See e.g. Peter Buchanan L.D. v. McVey*, [1955] A.C. 516, 529 (Ir.H Ct.1950), cited in *Sabbatino*, 376 U.S. at 437-38. Modern history [is not] without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighboring communities but would run counter to their political aims and vital interests . . . . So long as these possibilities exist it would be equally unwise for the courts to permit the enforcement of the revenue claims of foreign States or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection. See also Moore v. Mitchell, 30 F.2d 600, 604 (2ds Cir. 1929); [A] court will not recognize those [liabilities] arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state . . . . No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

This case raises an important issue regarding the application of the revenue rule; whether despite the existence of the rule, the Executive Branch, can nonetheless prosecute for wire fraud where the only alleged intended loss is a loss of tax revenue to a foreign sovereign. As explained in more detail below, this is an issue as to which the courts of appeals to not agree and which raises important separations of powers and other issues, as Congress has not authorized the prosecutions in question but rather has insisted upon reciprocity with foreign nations, a condition that is not satisfied in this case.

ii. The Requirement That A Scheme To Defraud" Under Section 1343 Be Aimed at "Money or Property"

Mr. Fountain was convicted under the federal wire fraud statute, Section 1343. This statute provides for criminal punishment of anyone who, "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," uses some means of interstate transmission in furtherance of that scheme. 18 U.S.C. § 1343. The "money or property" limitation is inherent in the meaning of "scheme or artifice to defraud," so conduct is not actionable under the statute unless its aim is to deprive someone of actual money or property. *See McNally v. United States,* 483 U.S. 350, 360 (1987). The statute has since been amended by Congress to also include schemes to deprive someone of the "right to honest services." *See Cleveland v. United States,* 531 U.S. 12. 19-20 (2000). This aspect of the statute is not at issue in this case. The wire fraud statute, 18 U.S.C. § 1343, is the "lineal 8 (Continued) descendant" of the mail fraud statute, 18 U.S.C. § 1341. *McNally v. United States*, 483 U.S. 350, 374 (1987) (citation and internal quotation marks omitted). "Because these statutes use the same relevant language, they are analyzed in the same way." *See, e.g., United States v. Slevin,* 106 F.3d 1086, 1088 (2d Cir. 1996).

This Court has also refused efforts by the Government to expand the reach of the mail and wire fraud statutes by applying them to state interests not falling within the traditional concept of "property." *See Cleveland v. United States,* 531 U.S. 12 (2000). In this Court's analysis, the determination of whether a

government has been defrauded of property involves an inquiry into whether the government's interest is primarily regulatory or fiscal in nature, the extent to which the relevant interest is transferable, and the extent to which the government has put its own assets at risk, among other factors. *Id.* at 22-24. *Cleveland* held that a fraudulent scheme aimed at obtaining an unissued gaming license was not actionable under the mail fraud statute, because such a license did not constitute "property" in the hands of the state. *See id.* at 24. To allow such a prosecution, this Court stated, would be to "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. This Court also stated in *Cleveland* that the rule of lenity is "especially appropriate" in interpreting the scope of "property" under Section 1341, for the reason that this statute – like Section 1343 – defines a predicate RICO offense. *See* 531 U.S. at 25. The statute has since been amended by Congress to also include schemes to deprive someone of the "right to honest services." *See Cleveland v. United States,* 531 U.S. 12. 19-20 (2000). This aspect of the statute is not at issue in this case. The wire fraud statute, 18 U.S.C. § 1343, is the "lineal 8 (Continued) descendant" of the mail fraud statute, 18 U.S.C. § 1341. *McNally v. United States*, 483 U.S. 350, 374 (1987) (citation and internal quotation marks omitted). "Because these statutes use the same relevant language, they are analyzed in the same way." *See, e.g., United States v. Slevin,* 106 F.3d 1086, 1088 (2d Cir. 1996). *id.* This case involves a similar sweeping expansion, one that seeks to treat potential revenue claims of a foreign sovereign–whether or not reduced to final judgments or actual assessments and whether or not Congress has approved cooperation in this sphere– as "property."

b. The Circuit Split over Application of Section 1343 To Schemes Whose Sole Object Is the Avoidance of Taxes Potentially Owed to a Foreign Sovereign.

Four Circuits have addressed the question whether efforts to avoid paying taxes to a foreign sovereign constitute actionable mail fraud or wire fraud. The cases have resulted in doctrinal disarray.

i. The First Circuit

In *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), the defendants had been convicted of wire fraud on the basis of a scheme to deprive Canada of revenue by transporting tobacco into the country without paying excise duties at the border. The court reasoned that because the alleged scheme to defraud had as its sole object the violation of Canadian revenue laws, the convictions could be upheld only on the basis of determination that the petitioners had intended to violate those laws. *See* 80 F.3d at 587. This in turn would require the court to pass on any challenges to those laws and any claims that the petitioners' actual or intended actions would not actually have violated them. *See id.* Because the court would thus be "effectively passing on the validity and operation of the revenue laws of a foreign country," the First Circuit found that "the important concerns underlying the revenue rule [we]re implicated." *Id.*

In the First Circuit's view, even though the case did not require it "to enforce a foreign tax judgment as such," upholding the conviction would "amount functionally to penal enforcement of Canadian customs and tax laws." *Id.* In addition to violating the long-

standing revenue rule, the court found that this would conflict with the policy of Congress, embodied in 18 U.S.C. § 546, that the United States should criminally penalize the smuggling of goods only into those foreign countries that have a reciprocal law. *See* 80 F.3d at 588. Given these inherent tensions, the First Circuit found that if Congress wished to authorize courts to apply the wire fraud statute to evasion of foreign tax obligations, "'it must speak more clearly than it has.'" *Id.* (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)). Accordingly, the court ruled that schemes to avoid payment of taxes to a foreign sovereign are not schemes to defraud within the meaning of Section 1343. *Id.*

ii. The Second Circuit

The Second Circuit has addressed the application of the revenue rule to mail fraud or were fraud involving non-payment of foreign taxes on three different occasions. In *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), the court reviewed a district court's dismissal, in accordance with *Boots*, of an indictment alleging wire fraud on the basis of a "scheme to defraud" whose sole object was the importation of liquor into Canada in avoidance of Canadian revenue law. *See*, 130 F.3d at 548-49. The court reversed, holding that the defendants' actions fell within the language of the statute and that the First Circuit in *Boots* had been mistaken in believing the revenue rule to be implicated by such a prosecution. In reaching this result, the Second Circuit reasoned that there was no need to pass on the validity of the underlying Canadian revenue law, because the only question was whether the defendants had used interstate wires in furtherance of a scheme *intended* to defraud someone of money or property. *See* 130 F.3d at 552. In the *Trapilo* court's view, the substance of the Canadian

law would be relevant only to the question whether the defendants had *succeeded* in defrauding the Canadian government of money or property. *See id.* Because the ultimate success of a scheme to defraud is not an element of the offense, the court held that the revenue rule was not implicated by the prosecution. *See id.* at 552-53.

The Second Circuit undermined the reasoning of *Trapilo* three years later, when it decided *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000). In *Pierce*, the court reversed the convictions of several of the same defendants whose prosecution it had allowed to proceed in *Trapilo*. *See* 224 F.3d at 160. The court observed that the defendants were "not accused of scheming to defraud the Canadian government of its money." The Second Circuit announced its decision in *Pierce* in August 2000, three months before this Court decided *Cleveland*. The Second Circuit did not address whether the convictions should be set aside for the independent reason that the right to receive taxes was not an adequate property interest under the wire fraud statute. This Court also stated in *Cleveland* that the rule of lenity is "especially appropriate" in interpreting the scope of "property" under Section 1341, for the reason that this statute – like Section 1343 – defines a predicate RICO offense. *See* 531 U.S. at 25. *See id.* at 165 (emphasis in original). Accordingly, the Second Circuit held that the prosecution had to prove that such a right actually existed. *Id.* Whereas the court in *Trapilo* had reasoned that legal impossibility was irrelevant to a defendant's having formed the requisite intent to defraud, *see* 130 F.3d at 552 n.9, in *Pierce* the court recognized that the statutory requirement of a fraudulent scheme directed at "money or property" could not be satisfied if there were no Canadian statute creating the "property" by actually

imposing the import duty in the first place. *See* 224 F.3d at 166. The prosecution's failure to introduce evidence at trial demonstrating the existence of such a revenue law thus required that the convictions be reversed. The court attempted to reconcile its holding with *Trapilo* by making a distinction between the requirement that the government demonstrate the "existence" of a revenue law creating the alleged property right, and the need for a court to examine the validity and rise to a property interest any more than a non-existent one. operation of such a law. *See Pierce*, 224 F.3d at 167. Two of the defendants in *Trapilo* sought review in this Court. In opposing the petition for certiorari, the government recognized the existence of a direct conflict between the Second Circuit's decision in *Trapilo* and the First Circuit's decision in *Boots*. The government, however, urged this Court to defer review because only two circuits had passed on the issue. *See* Brief for The United States In Opposition, *Pierce v. United States*, S.Ct. Case Nos. 97-1792; 97-8964 at 5 (July 1998). *See id.*

One year later, in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), the Second Circuit was called upon to decide whether, given that it had held evasion of foreign taxes to constitute a "scheme to defraud" under Section 1343, the foreign sovereign victimized by such a scheme could seek damages in a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In a thorough opinion, the Second Circuit recognized the "continuing vitality" of the revenue rule. *See* 268 F.3d at 109-26. The court also acknowledged that this Court's holding in *Cleveland* had cast doubt upon the correctness of *Trapilo* and *Pierce*. *See id.* at 124 n.27. Two of the defendants in *Trapilo* sought review in this Court. In opposing the petition for certiorari, the

government recognized the existence of a direct conflict between the Second Circuit's decision in *Trapilo* and the First Circuit's decision in *Boots*. The government, however, urged this Court to defer review because only two circuits had passed on the issue. *See* Brief for The United States In Opposition, *Pierce v. United States*, S.Ct. Case Nos. 97-1792; 97-8964 at 5 (July 1998).

The defendant tobacco companies in *R.J. Reynolds* were alleged to have engaged in a pattern of smuggling tobacco products into Canada without paying the applicable import taxes. *See id.* at 105. Under the Second Circuit's holdings in *Trapilo* and *Pierce*, such conduct could clearly be prosecuted as wire fraud without violating the revenue rule. Moreover, as this Court had pointed out in *Cleveland*, wire fraud has been expressly designated by Congress as a "racketeering activity" that may serve as the basis of a civil RICO action. Nevertheless, the Second Circuit concluded that to allow a foreign sovereign to bring such an action *would* violate the revenue rule, and that the civil RICO suit predicated on wire fraud would require the court to pass on whether the underlying fraud had been successful, whereas a criminal prosecution for wire fraud would not. *See* 268 F.3d at 108-09. The court also stated that, unlike a criminal prosecution, a civil action would require it to quantify the exact amount of unpaid revenue in order to determine damages. *See id.* Such determinations, the court reasoned, would directly implicate the core concerns of the revenue rule, and absent clear evidence of congressional intent to abrogate this rule, principles of statutory construction required it to construe the statute in a manner that preserved the revenue rule. *See id.* at 127.

In dissent, Judge Calabresi asserted that there is

no basis in either the revenue rule or federal law for interpreting the scope of the wire fraud statute differently in criminal and civil cases, so that there was no way to distinguish *Trapilo* and *Pierce* from *R.J. Reynolds*, as the majority had sought to do. *See id.* at 138-40 (Calabresi, J., dissenting). Judge Calabresi further refuted the panel's distinction by pointing out that in the event of a conviction under *Trapilo* and *Pierce*, the sentencing guidelines would require sentence to be imposed based on the amount of tax revenue lost, thus making necessary precisely the same degree of involvement with and interpretation of Canadian law that the court claimed to fear in connection with the RICO suit. *See id.* Two of the defendants in *Trapilo* sought review in this Court. In opposing the petition for certiorari, the government recognized the existence of a direct conflict between the Second Circuit's decision in *Trapilo* and the First Circuit's decision in *Boots*. The government, however, urged this Court to defer review because only two circuits had passed on the issue. *See* Brief for The United States In Opposition, *Pierce v. United States*, S.Ct. Case Nos. 97-1792; 97-8964 at 5 (July 1998).

Precisely the same argument applies, of course, to Congress's authorization in general terms of prosecutions to punish schemes to defraud someone of property.

iii. The Fourth Circuit

An initial panel in *United States v. Pasquantino*, 305 F.3d 291 (4th Cir. 2002) agreed with the reasoning of the First Circuit, and reversed the defendants' convictions on the ground that any determination whether Canada was actually, or would at some point have been, entitled to the tax revenues in question would involve an inquiry

into the validity and operation of a foreign revenue law, and such a determination is barred by the revenue rule. *See* App. __a. In its opinion, the panel majority rejected the Second Circuit's approach in *Trapilo* and *Pierce*, which recognize the need for the government to prove the *existence* of a foreign law giving rise to the alleged property right, while denying any need to pass on its validity and scope: "[R]ecognizing the *existence* of a law is inherently and inescapably tied to recognizing the *validity* and *scope* of that law." *See id.* at 298. The Fourth Circuit en banc panel that affirmed Petitioners' convictions did not dispute this basic point, but rather avoided it completely. The en banc court accomplished this by giving the revenue rule a very narrow reading that called only for the "nonenforcement of foreign tax judgments," as opposed to the "nonrecognition of foreign revenue laws." As noted above, the United States has not taken such a narrow view of the revenue rule. *See supra* __. 336 F.3d at 329. Under this narrow reading, the government's use of intended loss figures as a basis for sentencing also did not implicate the prohibitions of the revenue rule. *Id.* at 337-38.

iv. The Eleventh Circuit

Finally, the Eleventh Circuit has also addressed the application of the revenue rule to claims based on wire fraud. In *Republic of Honduras v. Philip Morris Companies, Inc.*, 341 F.3d 1253 (11th Cir. 2003), the court affirmed the dismissal of a civil RICO suit brought by a foreign sovereign to recover taxes that were allegedly evaded by means of smuggling tobacco into its territory. *See id.* at 1255. The court did so on the basis of a construction of the revenue rule that required it to abstain from considering any claims that would require it to "pass judgment on unadjudicated foreign tax claims for

which the political branches of our government have not provided an enforcement mechanism." 341 F.3d at 1261. In this connection, the Eleventh Circuit cited approvingly the First Circuit's statement in *Boots* that, "[w]here a domestic court is effectively passing on the validity and operation of the revenue laws of a foreign country, the important concerns underlying the revenue rule are implicated." 341 F.3d at 1256 (citing *Boots*, 80 F.3d at 587). While a criminal prosecution under the wire fraud statute was not before the Eleventh Circuit, its reasoning and its approval of *Boots* suggest that it would regard such an action as barred by the revenue rule.

As shown by these significant inter-circuit–and, in the case of the Second and Fourth Circuits, intra-circuit–disagreements, the question whether the federal wire fraud statute applies to schemes for avoiding payment of taxes to foreign sovereigns is a difficult and contentious one that has grown in significance over time and only this Court can resolve. The various majority and dissenting opinions issued by these four circuits, while failing to achieve a coherent doctrine with regard to the interplay of the revenue rule and Section 1343, have raised and discussed virtually every facet of the problem.

A. The Second Circuit's Ruling In This Case Creates Serious Problems With Far Reaching Consequences

a. The Holdings of the Second Circuit Allows the Executive to Make and Implement Policy Regarding Enforcement of Foreign Revenue Laws Without Clear Authorization from–and in Direct Conflict with the Policies of–the Legislature

The Second and Fourth Circuits have taken the

position that prosecutions such as the one at issue in this case do not raise any problem of separation of powers in foreign affairs, because such prosecutions must be brought by the Executive Branch, which has the constitutional authority to conduct foreign policy and will not bring such a case if it conflicts with U.S. interests in that sphere. *See Pasquantino*, 336 F.3d at 331; *R.J. Reynolds*, 268 F.3d at 123. This position overlooks the fact that the Legislative Branch is also responsible for foreign affairs, and has an interest in determining when and under what circumstances the United States will be involved in enforcing tax obligations of other countries. *See* U.S. Constitution, Art 1, §. 9 (giving Congress the power to regulate commerce with foreign nations); *id.* at Art. 2 §. 2 (requiring the treaties be made with consent of Senate). The question presented is whether the wire fraud statute–which lacks any express reference or facially evident relation to foreign policy–can properly be read as conferring carte blanch in these matters to the Executive. There are a number of reasons for believing that the Executive's exercise of unilateral discretion in this area conflicts with relevant policies enacted by the Legislature.

The United States has over the years entered into several tax treaties with foreign sovereigns that provide for information exchange and sometimes for limited collection assistance. *See R.J. Reynolds*, 268 F.3d at 115-19 (reviewing history of such agreements). As the Second Circuit has recognized, review of these treaties shows that "the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Id.* at 119.

In 1995, for example, the Senate ratified a treaty with Canada that provided for such assistance. *See* Revised Protocol Amending the Convention With Respect to Taxes on Income and on Capital of September 26, 1980, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 ("Revised Protocol"). Notably, this treaty provides that the United States shall give such assistance only if Canada certifies that a revenue claim has been "finally determined." *id.* at Art. 15, ¶ 2. The Revised Protocol does not authorize the United States to assist Canada in the collection of unadjudicated tax claims, an effort that would embroil the United States not just in assisting with collection efforts, but which would require U.S. courts to develop expertise regarding the operation and effect of revenue laws that are comparable in complexity to our own. As a leading tax commentator has written, tax laws "are not self-enforcing and do not themselves create a collectible liability." Michael I. Saltzman, IRS Practice and Procedure ¶ 10.01 (2003) (discussing the "fundamental importance of an assessment in the administration of the tax laws"); *see also Bull v. United States*, 295 U.S. 247, 259 (1935) (noting that under U.S. tax law, "[t]he statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment.").

In addition, the Revised Protocol states that "[n]o assistance shall be provided" with regard to Canadian revenue claims against persons who are U.S. citizens or corporations at the time that the tax liability is incurred. *Id.*, ¶ 8. Even this sharply circumscribed level of assistance was regarded as a major step, one that was

taken only after lengthy and careful consideration, and that was possible only because of the extremely close ties between the U.S. and Canada and the similarity of the legal and procedural protections afforded by the two states. *See R.J. Reynolds*, 268 F.3d at 121 (quoting *Treasury Technical Explanation* (discussing art. 15)). The prosecution in this case is in serious tension with this treaty both because Petitioners were U.S. citizens at all relevant times and because their tax liability, if any, to the government of Canada was never subject to a final determination in that country.

Moreover, the Extradition Treaty between the United States and Canada requires each country to deliver to the other any person who has been accused of the "[u]se of the mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money or property by false pretenses." Treaty on Extradition Between the United States and Canada, art. 1; annexed schedule, no. 27, TIAS 8237; 27 U.S.T. 983; 1971 U.S.T. Lexis 226 (March 22, 1976, Date-In-Force). Such provision manifests a strong intent by the political branches to handle criminal prosecutions of this nature through the treaty process, and not through unilateral action by a federal prosecutor.

In view of the careful consideration that went into negotiating and delimiting these international agreements, it seems highly incongruous to conclude, as does the Second Circuit, that the wire fraud statute–adopted without any apparent consideration of these issues at all–authorizes federal prosecutors to bring criminal actions against U.S. citizens for evasion of *any* revenue law promulgated by *any* foreign country, regardless of whether there is or ever could be a "finally

determined" tax judgment on which to base such prosecution.

The Second Circuit's interpretation of the wire fraud statute is also in apparent conflict with federal law regarding prosecution of the smuggling of goods into foreign countries. Congress has enacted a statute addressed specifically to this issue, and it provides that the federal government may prosecute smuggling of goods into a foreign country only if the foreign government has a reciprocal law. *See* 18 U.S.C. § 546. The statute also provides for sentences limited to a fine or not more than two years imprisonment. *See id.* By prosecuting smuggling under the wire fraud statute, the Executive circumvents both these limitations, thus negating the Legislature's role in guiding foreign affairs. Despite the existence of Section 546, the Executive represented to the court of appeal that the wire fraud statute has been made "the primary legal tool in the United States at this time" to combat smuggling from the U.S. into foreign countries. United States' Petition for Rehearing En Banc, *United States v. Pasquantino*, at 7 (4th Cir. Case Nos. 01-4463, 4464, 4465). This unilateral expansion of Section 1343 into an all-purpose international smuggling statute renders Congress's enacted policy with regard to the prosecution of international smuggling a virtual dead letter.

a. Allowing the Executive to Engage in Selective Application of the Revenue Rule Has Serious Implications for the Treatment of U.S. Citizens Abroad and for the Conduct of International Business.

The revenue rule is not merely a principle of American jurisprudence, but a principle of international

law, found on an expectation of reciprocity. *See e.g., R.J. Reynolds,* 268 F.3d at 122-23 (noting the importance of reciprocal recognition of the revenue rule to the treaty between the United States and Canada regarding extraterritorial tax collection); *Government of India v. Taylor*, [1955] A.C. 491, 508 (H.L.) ("[The revenue rule] is enforced with the knowledge that in foreign countries the same rule is observed."). Thus the issue presented in this case affects not merely whether our courts will be in the business of interpreting and applying foreign revenue law, but also whether foreign courts will be in the business of applying and interpreting U.S. revenue law. The import of the Second Circuit's position is that while the United States will not assist foreign countries in recovering monies owed to them under their revenue laws, it will not hesitate to use those laws as a basis for imposing domestic criminal sanctions where the Executive finds this to be in the interest of the United States.

If this principle of selective executive application of the revenue rule becomes recognized as U.S. legal doctrine, other nations may well choose to adopt the same position. Thus foreign governments wishing to harass U.S. citizens or to interfere with U.S. interests may take these cases as a signal that they are free to criminally prosecute American citizens and businesses abroad for putative violations of U.S. tax law. This could result, for example in Americans being tried for alleged violations of the Internal Revenue Code under procedures of foreign governments that do not comport with the procedural rules contemplated by the Internal Revenue Code, the Federal Rules of Criminal Procedure or the U.S. Constitution. Americans could face criminal sanctions in foreign countries for violations of U.S. law that would not give rise to the same sanctions here. The

questions whether Congress effected such a radical change in foreign relations simply by enacting the wire fraud statute, and whether the Executive Branch may effect such a change unilaterally despite the existence of the revenue rule and enactments of Congress that bespeak a contrary policy, are important matters that this Court should address.

This case also has chilling implications for all U.S. businesses that are involved in international transactions. The result of the Second Circuit's holding in this case is that U.S. citizens and corporations can be prosecuted for wire fraud for scheming to avoid payment of taxes to a foreign government, regardless of whether those taxes would ever actually have accrued. At the same time, defendants can be sentenced on the basis of a federal court's estimation as to how much in taxes *would have* been owed under the foreign revenue law. Under the reasoning of this case, any time a U.S. business takes an aggressive position regarding its foreign tax obligations, it conceivably risks being charged with "scheming" to deprive a foreign sovereign of tax revenue. In today's climate of corporate skepticism, the mere possibility of such criminal liability may have a significant *in terrorem* effect that prevents U.S. companies from taking legitimate positions regarding their foreign tax liabilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

APPENDIX A

United States Court of Appeals
Second Circuit

JOHN FOUNTAIN, also known as Chick,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Docket No. 03-2188

Argued: November 4, 2003
Decided: January 26, 2004

Bruce R. Bryan, Syracuse, New York, for Petitioner-Appellant John Fountain.

Elizabeth S. Riker, Assistant United States Attorney for Glenn T. Suddaby, United States Attorney for the Northern District of New York, for Respondent-Appellee the United States of America.

Before: McLAUGHLIN and KATZMANN, Circuit Judges SCHEINDLIN, District Judge

KATZMANN, Circuit Judge.

In the context of a petition for habeas corpus, this case considers whether, after the Supreme Court's decision in

Cleveland v. United States, 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000), taxes owed to a government can constitute "property" in its hands within the meaning of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. It also evaluates the continued validity of our decision in *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), that the common law revenue rule does not bar criminal prosecutions under the mail and wire fraud statutes in light of our more recent decision in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001).

Petitioner appeals from a decision and order of the United States District Court for the Northern District of New York (Thomas J. McAvoy, *District Judge)* denying his motion for habeas corpus under 28 U.S.C. § 2255 but granting a certificate of appealability on two issues. We hold the taxes owed to a government can constitute ***252** property in its hands within the meaning of the federal mail and wire fraud statutes, and that *Trapilo* remains good law in this Court.

I. BACKGROUND

After retiring from twenty-one years of service to the New York State Police, Petitioner John Fountain entered the currency exchange business in Hogansburg, New York, adjacent to the St. Regis Mohawk Reservation. Using cashier's checks and wire transfers, he began exchanging Canadian U.S. currency in conjunction with a scheme to transport cigarettes from Canada into the St. Regis Mohawk Reservation then back to Canada to be sold on the black market. The enterprise was designed to circumvent the high Canadian taxes on tobacco products.

As a result of these currency exchange activities, Fountain was indicted, along with others, in July, 1997 (the "Miller Indictment"), on the charge of conspiracy to launder the proceeds of a wire fraud scheme in violation of the money laundering statute, 18 U.S.C. § 1956(a)(1)(A)(I), 1956(h). The illegality of the underlying conduct derived from the wire fraud statute, which provides that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title 18 U.S.C. § 1343. The government claimed that the conspiracy was intended to defraud both the United States and Canada, asserting that both countries were deprived of tax revenues.

Other individuals involved in the scheme had already been indicted in 1996 (the "*Trapilo/Pierce* Indictment"), and litigation had progressed in their case. These defendants had successfully moved, in the district court, to dismiss the indictment based upon the First Circuit's application of the common law revenue rule to bar a similar prosecution in *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996). *See, United States v. Trapilo*, No. 96 Cr. 54, 1996 WL 743837, 1996 U.S. Dist. LEXIS 19237 (N.D.N.Y. Dec. 20 1996). As the court in *Boots* explained the revenue rule, this "firmly embedded principle of common law . . . holds that courts generally will not enforce foreign tax judgments, just as they will not

enforce foreign criminal judgments, although they will enforce foreign non-tax civil judgments unless due process, jurisdictional, or fundamental public policy considerations interfere." *Boots*, 80 F.3d at 587. Although the criminal prosecution involved in *Boots* did not directly involve enforcement of a foreign tax judgment, the court determined that the revenue rule still operated to nullify the defendants' convictions because "[w]here a domestic court is effectively passing on the validity and operation of the revenue laws of a foreign country, the important concerns underlying the revenue rule are implicated." *Id.* at 587. When the government appealed the district court's decision in *Trapilo*, however, we reversed, holding that "[t]he [wire fraud] statute neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue, and the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute." *United States v. Trapilo*, 130 F.3d 547, 551 (2d Cir. 1997). Based on the outcome of *Trapilo*, the district court rejected the Miller defendants' similar attempt to dismiss the indictment against ***253** them. *See, United States v. Miller*, 26 F.Supp.2d 415, 430 (N.D.N.Y. 1998). Because the *Trapilo* decision was directly adverse to his position, Fountain opted not to appeal the district court's determination and instead entered a plea of guilty in the hopes of receiving a lesser sentence.

Although Fountain had been charged with the intent to defraud both the United States and Canada, he admitted only to a scheme to deprive the Canadian government of revenue at his plea allocution. As Petitioner stated, "I didn't defraud the U.S. government." Nor did the prosecutor attempt to force Fountain to acknowledge that he was guilty of doing so. As the

government responded, "Mr. Fountain doesn't have to enter his plea on the basis of his participation in a conspiracy to defraud the United States of any tax revenue." The court added, "Yes, as I understand it, there is no technical requirement to fulfill the elements . . . that comprise the crime that you're pleading to that there be any defrauding of the United States Government of dollars. The Court accepts that." As a result of his plea, Fountain was sentenced to 84 months' imprisonment by a judgment of conviction entered in October, 1999. This term was subsequently reduced to 60 months.

Following Petitioner's conviction, two legal developments occurred. First, the Supreme Court held, in *Cleveland v. United States,* 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000), that unissued state video poker licenses did not qualify as "property" within the compass of the mail fraud statute - - identical in all relevant respects to the wire fraud statute. *See, Carpenter v. United States,* 484 U.S. 19, 25 n.6, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."). As Justice Ginsburg stated, writing for a unanimous Court, "It does not suffice . . . that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Cleveland*, 531 U.S. at 15, 121 S.Ct. 365. Second, we determined in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.,* 268 F.3d 103 (2d Cir. 2001), that the revenue rule still applies to bar civil suits aimed at enforcing foreign tax laws.

As a result of these decisions, Fountain brought a

habeas petition under 28 U.S.C. § 2255, alleging that he had not violated the wire fraud statute because:

> (i) the Canadian Government did not possess "property" in its hands at the time of the alleged fraud;
> (ii) the wire fraud statute was not intended to protect a foreign government's rights against a scheme to defraud; and
> (iii) the alleged act of fraud occurred beyond the territorial jurisdiction of the United States, and therefore failed to meet the "essential conduct element" giving jurisdiction of a United States court over the crime alleged. . . .

In the alternative, Petitioner claimed that his counsel had been ineffective in failing to raise these issues.

The district court ruled against Fountain, determining that he had procedurally defaulted, and that he could not surmount the default by showing either cause and prejudice or actual innocence. Furthermore, the court held that Petitioner's counsel had not been ineffective for failing to raise a revenue rule defense. However, the court did certify two issues for review by this court:

> (1) whether counsel was constitutionally ineffective for failing to pursue the Revenue Rule defense in light of Petitioner's ***254** assertion that he did not defraud the United States; and
>
> (2) whether the conviction was obtained without proof beyond a reasonable doubt of each element of the crime and therefore whether Petitioner is

being unconstitutionally held.

These are questions that we consider below.

II. ANALYSIS

[1][2] A court of appeals reviews a district court's denial of a 28 U.S.C. § 2255 petition *de novo*. *Coleman v. United States*, 329 F.3d 77, 81 (2d Cir. 2003). The contours of Fountain's case are largely delineated by the Supreme Court's decisions in *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), and *Massaro v. United States*, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). *Bousley* held that an individual who pled guilty to "using" a firearm under 18 U.S.C. § 924(c)(1) would not be procedurally barred from bringing a habeas petition if he could demonstrate actual innocence based upon a subsequent Supreme Court case that restricted the scope of the meaning of "use" within the terms of the statute. A habeas action is not intended to substitute for a direct appeal. Any Petitioner who fails- -as Bousley and Fountain did - - to pursue such an appeal would ordinarily be procedurally barred from challenging his conviction. *United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) ("[W]e have long and consistently affirmed that a collateral challenge may not do service for an appeal."). As Chief Justice Rehnquist, writing for the majority in *Bousley*, reaffirmed, however, a petitioner may overcome this procedural bar if he can demonstrate "cause" and "prejudice" or that he is "actually innocent." *See, Bousley*, 523 U.S. at 622, 118 S.Ct. 1604; *Murray v. Carrier*, 477 U.S. 478, 495,96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). In *Massaro*, the Court added that the procedural default rule delineated by *Bousley* does not apply to claims of ineffective assistance of counsel.

See, Massaro, 123 S.Ct. at 1696. We construe the two issues that the district court certified for appeal as asking whether Fountain's counsel was constitutionally ineffective and whether Fountain can overcome the procedural bar applicable to his other claim by demonstrating actual innocence. We conclude that Petitioner cannot succeed on either basis.

A. Ineffective Assistance of Counsel

In order to demonstrate that he suffered from ineffective assistance of counsel, a petitioner "must show that the attorney's performance fell below an objective standard of reasonableness and that the outcome of his case would have been different had the attorney performed adequately." *United States v. Perez*, 129 F.3d 255, 261 (1997); *see also, Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (requiring a demonstration that (1) "counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense").

[3] Fountain argues that his trial lawyer should have pursued an appeal on the grounds that the common law revenue rule barred his conviction and that, had such an appeal occurred, the outcome of his trial would have differed. We need not consider whether Petitioner can fulfill the first prong of demonstrating that his "attorney's performance fell below an objective standard of reasonableness," because it is clear from our precedents that even if it did, Fountain was not prejudiced. In *R.J. Reynolds*, we distinguished between "civil suit[s] brought by a foreign sovereign" and criminal "actions prosecuted by the United States," determining that the revenue rule ***255** *R.J. Reynolds*, 268 F.3d at 123 and n. 24. In so doing, we did not challenge the validity of our prior decision in *Trapilo*, which held that the revenue rule

permitted prosecution under the wire fraud statute for tax fraud against foreign governments. [FN1] Because Fountain would not be able, under *Trapilo*, to invoke the revenue rule to invalidate his criminal conviction, he was not prejudiced by his attorney's failure to raise this defense on appeal.

> FN1. Petitioner would have us, a three-judge panel, overrule the law of the Circuit as expressed in *Trapilo*. We were not free to do so in *R.J. Reynolds*, and we are not free to do so now. *See, Monsanto v. United States*, 348 F.3d 345, 351 (2d Cir. 2003) (explaining that we are bound by prior precedent of this Court unless it is overturned *in banc*).

B. Actual Innocense

[4][5] We read the second issue that the district court certified- -"whether the conviction was obtained without proof beyond a reasonable doubt of each element of the crime and therefore whether Petitioner is being unconstitutionally held"- -as asking whether Fountain is actually innocent of money laundering because taxes, the object of his scheme to defraud, do not constitute property under the wire fraud statute after the Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12, 1221 S.Ct. 365, 148 L.Ed.2d 221 (2000). In order to establish actual innocence, "petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623, 118 S.Ct. 1604 (internal citations and quotation marks omitted). Furthermore, in the context of a habeas petition following a guilty plea, because "'actual innocense' means factual innocense, not mere legal insufficiency," *Bousley*, 523

U.S. at 623, 118 S.Ct. 1604, "the Government is not limited to the existing record to rebut any showing that petitioner might make. Rather . . . the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy. . . ." *Id.* at 623-24., 118 S.Ct. 1604. Because we hold that, under *Cleveland*, taxes remain property within the purview of the mail and wire fraud statutes, we need not reach the further question of whether the government can adduce additional evidence to demonstrate Fountain's factual guilt.

[6] As we have previously summarized, "[t]he essential elements of a mail [or wire] fraud violation are (1) a scheme to defraud, (2) money or property [as the object of the scheme], and (3) use of the mails [or wires] to further the scheme." *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996) (internal citation and quotation marks omitted). The mail and wire fraud statutes prohibit the use of both means of transmission in furtherance of "any scheme or artifice to defraud, or for obtaining money or property my means of false or fraudulent pretenses, representations, or promises." *See* 18 U.S.C. §§ 1341, 1343. Until 1987, many circuit courts interpreted "scheme or artifice to defraud" and "obtaining money or property" disjunctively, refusing to construe the "money or property" requirement as a limitation on the kinds of schemes to defraud covered by the statute. In *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), however, the Court determined that the mail fraud statute's "sparse legislative history . . . indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." *Id.* at 356, 107 S.Ct. 2875, stating that, "[i]f Congress desires to go

further, it must speak more clearly than it has," *id.* at 360, 107 S.Ct. 2875. Taking up the Court's invitation to action, Congress then expanded the law's reach to permit prosecutions for any scheme to defraud aimed at "the intangible right of honest services." Anti-Drug Abuse Act of 1988, § 7603(a), 18 U.S.C. § 1346; *but see Cleveland*, 531 U.S. at 20, 121 S.Ct. 365 (observing that "[s]ignificantly, Congress covered only the intangible right of honest services even though federal courts, relying on *McNally*, had dismissed, for want of monetary loss to any victim, prosecutions under § 1341 for diverse forms of public corruption, including licensing fraud").

Under this new statutory language, courts construed the "property" requirement liberally. In particular, the Second Circuit, following a number of other courts, permitted prosecutions for tax fraud to proceed under the mail and wire fraud statues. *See, United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (upholding a mail fraud conviction for tax fraud and determining that "[t]he absence of proof of taxes actually due to New York State is immaterial because success of a scheme to defraud is not required"); *United States v. Porcelli*, 865 F.2d 1352, 1360 (2d Cir. 1989) stating that, under *McNally* and *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316-98 L.Ed.2d 275 (1987), "the fact that New York's interest is unpaid sales taxes is intangible is no obstacle to a mail fraud prosecution"); *United States v. DeFirore*, 720 F.2d 757, 761 (2d Cir. 1983) (explaining that "four circuits before us have squarely applied the federal fraud statutes to state tax law violations").

[7] In deciding *Cleveland*, the Supreme Court reaffirmed that the scope of the mail and wire fraud statutes is not unbounded. The modest extent to which we understand the *Cleveland* decision to have

reconfigured the existing landscape dictates our resolution of Petitioner's claim that, after *Cleveland* taxes can no longer be considered property under the mail and wire fraud statutes. In *Cleveland,* Justice Ginsburg, writing for a unanimous Court, held that "[s]tate and municipal licenses in general . . . do not rank as 'property,' for purposes of [the mail fraud statute], in the hands of the official licensor," and that "[i]t does not suffice . . . that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Cleveland*, 531 U.S. at 15, 121 S.Ct. 365. In arriving at the conclusion that licenses are not property in the hands of the state, the Court examined a number of factors conducing to a determination of what should be categorized as property. The *Cleveland* Court emphasized the regulatory as opposed to revenue-collecting nature of Louisiana's video poker licenses and the fact that the State, could not alienate its licensing authority, *id.* at 20-23, 121 S.Ct. 365, while downplaying the significance of the right to exclude, *id.* at 24, 121 S.Ct. 365, a right that other cases deemed crucial in defining property. *See, e.g., Carpenter*, 484 U.S. at 26-27, 108 S.Ct. 316 (1987) (claiming that "exclusivity is an important aspect of confidential business information and most private property for that matter"). We do not read the Court's particular selection of factors as establishing rigid criteria for defining property but instead as providing permissible considerations.

The factor upon which the Court appears to have placed most weight is whether the government's right is regulatory or revenue-enhancing. Some of the language in *Cleveland* suggests that the Court balanced the regulatory against the revenue-collecting aspects of the

video poker licensing ***257** scheme. *See, Cleveland*, 531 U.S. at 20-22, 121 S.Ct. 365 (describing the State's "core concern" as "regulatory" despite the fact that the State argued that it "receives a substantial sum of money in exchange for each license and continues to receive payments from the licenses as long as the license remains in effect"). In the tax context, however, the attempt to discern whether particular laws are aimed more at generating revenue or at regulating may not be easily accomplished. Taxes regulating may not be easily accomplished. Taxes as products of the legislative stew, may have a variety of ingredients and purposes, and the primacy of one or another may not be readily distilled from the congressional cauldron. Indeed, every legislative choice to tax involves policy judgments as well as the decision to add to the government's financial resources. The imbrication of the regulatory with the revenue-collecting is particularly apparent in the context of taxes like those at issue in this case- -taxes upon cigarets, alcohol, or other items of which the state wishes to regulate the consumption but from which it also raises revenue. We therefore place weight upon the Court's observation that monetary loss was not involved at all in the offense underlying the conviction in *Cleveland*.

Tellingly, as to the character of Louisiana's stake in its video poker licenses, the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law. Indeed, there is no dispute that TSG paid the State of Louisiana its proper share of revenue, which totaled more than $1.2 million, between 1993 and 1995. If Cleveland defrauded the State of "property," the nature of that property cannot be economic. *Cleveland*, 531 U.S. at 22, 121 S.Ct. 365. This formulation indicates that, in the context of government regulation, monetary loss presents a critical,

perhaps threshold consideration. The mere fact that the government is authorized to collect revenue under the provisions of a licensing law is not determinative; the relevant inquiry is, rather, whether the scheme prosecuted under the mail or wire fraud statute is designed to defraud the government of its revenues or of its licenses. It is in this light that the Court's statement upon which Petitioner relies- -that, "[e]ven when tied to an expected stream of revenue, the State's right of control does not create a property interest any more than a law licensing liquor," *id* at 23, 121 S.Ct. 365- -must be interpreted. While a liquor license might not constitute property in the hands of the state, the sales taxes that the government can anticipate collecting from transactions in alcohol are property under the mail and wire fraud statutes.

The result accords with the manner in which the government's right to collect taxes has historically been treated even outside the context of the mail and wire fraud statutes. In *Manning v. Seeley Tub & Box Co. of New Jersey*, 338 U.S. 561, 70 S.Ct. 386, 94 L.Ed. 346 (1950), the Supreme Court considering the extent to which a taxpayer was obliged to pay interest on an assessed tax deficiency, determined that, "[f]rom the date the original return was to be filed until the date the deficiency was actually assessed, the taxpayer had a positive obligation to the United States: a duty to pay its tax," and that, "[i]n the absence of a clear legislative expression to the contrary, the question of who properly should possess the right of use of the money owed the Government for the period it is owed must be answered in favor of the Government." *Id*. at 565-66, 70 S.Ct. 386. In general then, taxes owed to the government- -even if not yet collected- -are property in the hands of the government.

Likewise, before *Cleveland*, none of the circuits considering the question whether ***258** taxes are property in the hands of the government determined that they are not. *See, e.g., United States v. Dale*, 991 F.2d 819, 849 (D.C.Cir. 1993) (per curiam) ("adopt[ing] the position and reasoning of all other courts that have published decisions squarely on point" and upholding wire fraud convictions because "the tax code is not the exclusive regime under which tax fraud schemes may be prosecuted"); *United States v. Helmsley*, 941 F.2d 71, 94-95 (2d Cir. 1991) (upholding a mail fraud conviction based upon state tax fraud); *United States v. Bucey*, 876 F.2d 1297, 1310 (7th Cir. 1989) (holding, based on "the general principle that the government has a property right in tax revenues on the date that they accrue," that "a scheme to defraud the United States of money and property, that is income taxes satisfies the *McNally* money or property requirement" (internal quotation marks omitted)); *United States v. Miller*, 545 F.2d 1204, 1216 n. 17 (9th Cir. 1976) (upholding a mail fraud conviction based upon the filing of false tax returns). The only related case to hold otherwise is *United States v. Henderson*, 386 F.Supp. 1048 (S.D.N.Y. 1974), a district court case dismissing mail fraud counts against a defendant on the ground that Congress did not intend for schemes to defraud the federal government of tax revenue to be prosecuted under the mail fraud statute. Although this Circuit has not explicitly disapproved of the decision in *Henderson*, other district courts in this Circuit have reaffirmed the general principle that taxes can be the object of conduct criminalized by the mail and wire fraud statutes. *See, e.g. United States v. Regan*, 713 F.Supp. 629, 634 (S.D.N.Y. 1989) (noting that "[e]fforts to rely on [the *Henderson* court's] broad claim that the mail fraud statute was not intended to reach the crime of tax evasion have been decisively rejected by the Second

Circuit in cases involving distinguishable fact patters"). *Henderson*--which other circuits have rejected, *see, e.g., Miller*, 545 F.2d at 1216 n. 17- -thus provides weak authority for the proposition that schemes aimed at defrauding the government of taxes do not fall within the scope of the mail and wire fraud statutes.

The contrast between this relatively clear picture and the turmoil within federal courts over the question of whether licenses constituted property under the mail and wire fraud statutes before *Cleveland*, is additionally instructive. By the time that the Supreme Court intervened to resolve the debate, a majority of the circuits had already determined that "the government does not relinquish 'property' for purposes of [the mail fraud statute] when it issues a permit or license." *Cleveland*, 531 U.S. at 17, 121 S.Ct. 365; *see id.* at 17-18, 121 S.Ct. 365 (citing decisions by the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). Several of these circuits, including the Seventh, had held that income taxes were property with respect to the mail and wire fraud statutes. *See, United States v. Goulding*, 26 F.3df 656 663 (7th Cir. 1994) (stating that a count in the indictment "charged a scheme to obtain money and property, namely income taxes"). Taxes were thus much more firmly identified as property pre-*Cleveland* than permits and licenses; were *Cleveland* meant to foreshadow the shattering of that consensus, the Supreme Court might reasonably have been expected to signal that there was at least a question as to whether taxes might be excluded from the definition of property under the mail fraud statute. This the Court did not do.

Other courts' interpretations of *Cleveland* have likewise confirmed the conceptual differences between treating taxes and considering licenses as property.

Most applications of *Cleveland* have occurred in the licensing context. *See, e.g.* ***259** *United States v. LeVeque*, 283 F.3d 1098, 1102-03 (9th Cir. 2002) (holding that, under *Cleveland*, a hunting license is not property for the purposes of the mail fraud statute); *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002) (granting a petitioner *coram nobis* relief because after *Cleveland* his misrepresentations in applying for alcoholic beverage licenses did not violate the mail fraud statute).

A few circuits have, however, considered the relevance of *Cleveland* to prosecutions based upon tax fraud. In a similar case involving a scheme to evade Canadian taxes on liquor through smuggling alcohol from Maryland to Canada via Niagara Falls, New York, the Fourth Circuit held that, "because a government has a property right in tax revenues when they accrue, the tax revenues owed Canada and the Province of Ontario by reason of the Defendants' conduct in the present case constitute property for purposes of the wire fraud statute." *United States v. Pasquantino*, 336 F.3d 321, 332 (4th Cir. 2003) (*en banc*) (internal citation omitted). This Circuit previously reserved the question in interpreting RICO, noting that:

> In *Pierce*, the defendants were "not accused of scheming to defraud the Canadian Government of its property, but of its *right* to obtain property, its *right* to be paid money." The court assumed that such a right could constitute "property" for the purpose of RICO. These decisions predate *Cleveland v. United States*, in which the Supreme Court held that an unissued video poker license held by the state did not constitute "property" for the purposes of the mail fraud statute. Given that we decide this case based on the revenue rule, it

> is unnecessary for us to visit the issue of what constitutes "property" under RICO in light of *Cleveland*.

R.J. Reynolds, 268 F.3d at 124 n. 27 (internal citations omitted). Although we considered the issue in *Porcelli v. United States*, 303 F.ed 452 (2d Cir. 2002), we did not evaluate whether *Cleveland* had altered the landscape. Instead, we addressed the question of whether a New York State Court of Appals decision had rendered a habeas petitioner's mail fraud conviction invalid because it "establishe[d] that uncollected and unremitted sales taxes are not the property of the State." *Id.* at 453. We upheld the petitioner's conviction, citing *McNally*, but not *Cleveland*, on the grounds that the petitioner "used fraud to conceal from the State its claim for sales taxes and thus effectively deprived the State of its property right in its chose in action." *id.* at 457.

Although one post-*Cleveland* case appears, at first glance, to undermine the identification of taxes as property under the mail and wire fraud statutes, analysis demonstrates that tax credits are quite different from the run-of-the-mill sales and income taxes. In *United States v. Griffin*, 324 F.3d 350 (5th Cir. 2003), the Fifth Circuit concluded that unissued federal income tax credits that serve as incentives for developers to build housing projects setting aside certain units for low-income residents are not property in the possession of the governmental agency. *id*, at 354. The court reached this result, however, only after determining that "[u]nissued tax credits have zero intrinsic value," *id.*, and that "the benefit that the State of Texas receive[d] from [the fees it exacts after the tax credits have been issued] is minute compared to the benefit that is realized from the creation of affordable rental housing, which is the goal of the tax

credit program," *id.* at 355. As with the licenses at issue in *Cleveland*, the purpose of the tax credits was purely regulatory, and the credits did not entitle the State to a positive income flow. Nor would one who received a tax credit by fraudulent means deprive the State of its revenues. Rather, "[t]he tax credits are not actually ***260** issued on a project involving new construction . . . until the rental units actually have been constructed and placed in service at reduced rent for low-income occupants." *Id.* An entity that- -even improperly- - obtained the right to such tax credits would have to fulfill its obligations to the State and would not accrue a tax advantage without incurring a reciprocal duty. *Griffin* is thus distinguishable from cases involving sales or income taxes.

Finally, at oral argument, Petitioner expressly disavowed reliance on an argument that others involved in the same conspiracy have made- -that the government did not prove the existence, under federal law, of the statutory scheme according to which Canada enjoys the right to collect taxes. *See, United States v. Pierce*, 224 F.3d 158, 165,66 (2d Cir. 2000). Therefore, for purposes of this appeal only, we assume the existence of such a statutory scheme.

Because the decision in *Cleveland* did not affect courts' pre-existing consensus that taxes owed to a government- -whether state, federal, or foreign- - are property in the hands of that government, Fountain cannot meet his burden of demonstrating actual innocence.

CONCLUSION

Because we interpret the Supreme Court's

decision in *Cleveland* as effecting a limited alteration in the course of interpretation of the mail and wire fraud statutes rather than as completely redirecting the stream, e continue to deem taxes owed to governments- - whether foreign or domestic and whether state of federal- -"property" within the meaning of the mail and wire fraud statutes, Petitioner's claim of actual innocence must therefore fail. We likewise reaffirm our decision in *Trapilo* that the common law revenue rule does not bar prosecutions for defrauding foreign governments of taxes. In light of this precedent, Petitioner cannot demonstrate ineffective assistance of counsel. Fountain's petition for habeas corpus is therefore denied.

357 F.3d 250, 93 A.F.T.R.2d 2004-615.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN FOUNTAIN,

Petitioner, 5:01-CV-1712
97-CR-0199

vs.

UNITED STATES OF AMERICA,

Respondent

DECISION & ORDER

McAvoy, D.J.:

I. INTRODUCTION

John Fountain (j"Petitioner") filed a motion pursuant to 28 U.S.C. § 2255 seeking to vacate, set aside, or correct his sentence. Petitioner also moves under Rule 23(c) of the Federal Rules of Appellate Procedure, arguing that he should be released or his sentenced enlarged to home confinement for the remainder of his sentence based on his extraordinary circumstance and a high probability of success on the Section 2255 motion. The Government opposes both motions. For the reasons that follow, both motions are denied.

II. BACKGROUND

On July 10, 1997, a federal grand jury in the Northern District of New York indicted twenty-one defendants on various counts of a seven-count superseding indictment, alleging that defendants engaged in a scheme that involved smuggling tobacco and liquor products from the United States to Canada across the St. Regis Mohawk Indian Reservation ("Reservation"), and various money laundering acts related to the proceeds of the scheme. Petitioner was one of the defendants indicted in this case. *See, United States v. Miller*, 26 F.Supp.2d 415 (N.D.N.Y. 1998).

The scheme was primarily designed to avoid the payment of duties and taxes levied upon the importation of tobacco and liquor products by Canada. More particularly, the smuggling scheme operated by certain defendants surreptitiously transporting tobacco and liquor products by boat or sled from the Reservation into Canada, avoiding Canadian customs. The defendants employed codes and counter-surveillance throughout the smuggling scheme to avoid detection and made international and interstate telephone calls and facsimile transmissions to advance the smuggling operation. Ultimately, defendants resold the tobacco products on the "black market" in Montreal, Toronto, and other Canadian cities.

The smuggling scheme generated huge profits in Canadian currency, necessitating defendants to devise an illegal currency exchange/money laundering operation. Specifically, the Canadian currency was exchanged and/or deposited to purchase bank drafts or wire transfers, which were then used to pay for additional products, thereby promoting the smuggling operation. As

the Petitioner acknowledges, he operated a currency exchange in Hogansburg, New York, near the Reservation, and participated in the conspiracy through the currency exchange scheme. *See* November 3, 1998 Change of Plea Trans., p. 15.

According to the government, Reports of Financial Transactions Exceeding $10,000.00 in the Course Of A Trade Or Business (8300 forms) were neither prepared nor filed in connection with the scheme, preventing the Internal Revenue Service (IRS) from assessing or collecting taxes. The government also asserts that neither Currency Transaction Reports (CTRs) nor Reports of Currency or Monetary Instruments in Excess of $10,000 Crossing the Border (CMIRs) were prepared or filed.

Counts one, four and six of the superseding indictment charged dual-object conspiracies violating 18 U.S.C. § 371. They were based upon the agreement to (1) aid and abet those engaged in the outbound smuggling of tobacco and liquor products, see 18 U.S.C. § 546; and (2) conduct the underlying transactions without preparing the required forms, and recording or reporting the underlying transactions. Counts, two, three and five charged money-laundering conspiracies violating 18 U.S.C. § 1956(a)(1)(A) and (h). Count seven was a racketeering count charging defendants L. David Jacobs and Anthony Laughing with extortion, bribery, and the operation of an illegal gaming business. The indictment also contained various forfeiture allegations. They were based upon the agreement to (1) aid and abet those engaged in the outbound smuggling of tobacco and liquor products, see 18 U.S.C. § 546; and (2) conduct the underlying transactions without preparing the required forms, and recording or reporting the underlying

transactions.

In October of 1998, this Court issued a decision on the defendants' pre-trial omnibus motions which included their contentions that the money-laundering conspiracy counts should be dismissed because the Revenue Rule barred a prosecution alleging a wire fraud scheme aimed at defrauding a foreign government of tax revenue. *See, Miller*, 26 F.Supp.2d at 430. The Court rejected the argument, relying upon the Second Circuit's decision in *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997). *Trapilo* was a companion case to *Miller* in which the Second Circuit addressed essentially the same scheme as is in issue here. Defendants in that case were charged in a one-count indictment with money-laundering conspiracy in violation of 18 U.S.C. § 1956(a)(1)(2) and (h). *See, Trapillo*, 130 F.3d at 548-550; *see also, United States v. Pierce*, 224 F.3d 158, 160-164 (2d Cir. 2000). Following the decision on the omnibus motion, Petitioner pled guilty to Count 2 of the superseding indictment. *See*, Nov. 3, 1998 Change of Plea Trans. In doing so, he admitted to defrauding the Canadian Government of "millions of dollars of tax revenue, "but not to defrauding the United States Government in any fashion. Id. On October 19, 1999, Petitioner was sentenced to a term of incarceration of 84 months and a Judgment of Conviction was entered on October 25, 1999. The terms of incarceration was reduced to 60 months on April 19, 2001 after the Government made a motion pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure. An Amended Judgment of Conviction was entered on April 27, 2001. Petitioner thereafter filed a Notice of Appeal on April 30, 2001. The appeal was voluntarily discontinued on August 23, 2001. *See* dkt. #1077.

III. DISCUSSION

A. Introduction - Section 2255 Arguments

Petitioner advances three principal arguments in his Petition: (1) that based upon the Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12 (2000), the Canadian Government did not possess "property" in its hands at the time of the alleged fraud and therefore he could not have violated the wire fraud statute; (2) that based upon the Second Circuit Court of Appeal's decision in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), *cert denied*, 23 S.Ct. 513 (2002), *Trapilo* is overruled and the Revenue Rule now prohibits the prosecution; and (3) that the alleged act of fraud occurred beyond the territorial jurisdiction of the United States, and therefore failed to meet the "essential conduct element" giving jurisdiction to a United States court over the crime alleged in the superseding indictment.

In opposition, the Government argues that: (1) Petitioner's claims are procedurally barred because he failed to raise them on appeal; and (2) there has been no intervening change in law and therefore the cases cited by the Petitioner provide him no relief.

B. Failure to Raise Issues on Appeal

1. Parties' Arguments

Turning first to the Government's argument that Petitioner's motion is procedurally barred, The Government has not raised the statute of limitations as a

defense. The Second Circuit has held that the statute of limitations on a *5 writ of habeas corpus* governed the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244, is an affirmative defense which must be raised by the respondent. *Acosta v. Artuz*, 221 F.3d 117,121-122 (2d Cir. 2000). While the Court can raise the statute of limitations *sua sponte* when it has been clearly passed and after giving the Petitioner notice and an opportunity to be heard on the issue, Id. at 122-124, here the Petitioner argues that the Supreme Court's *Cleveland* decision negated an element of the crime for which he was charged. Inasmuch as Petitioner filed his motion within one year of the *Cleveland* decision, and because the Court finds that the claims are not substantively successful, the Court does not address the statute of limitations *sua sponte*.

Petitioner argues: (1) that he has sufficient cause for not appealing his sentence because he relied upon what he now considers the erroneously-decided case of *United States v.* Trapilo,130 F.3d 547 (2d Cir. 1997) to determine that an appeal would have been futile; (2) that the *Cleveland* and *R.J. Reynolds* decisions have created a change and/or reversal of law applicable to the instant case not available previously; (3) that based upon his interpretation of *Cleveland*, he is "actually innocent" of the charge to which he pled guilty; and (4) in the event the Court determines that the present arguments could have been raised previously, his trial counsel was onstitutionally ineffective for failing to raise them. Petitioner *does not* contend that his attorney failed to file on Notice of Appeal despite being advised to do so. *See, Garcia v. U.S.*, 278 F.3d 134, 137.

2. Standard - Procedural Bar

A § 2255 motion is not a substitute for an appeal. *Bousely v. United States*, 523 U.S. 614, 621 (1998); *United States v. Monoz*, 143 F.3d 632, 637 (2d Cir. 1998). Therefore, a defendant normally cannot use a § 2255 motion to litigate issues that could have been raised on direct appeal but were not. *Rosario v. United States*, 164 F.3d 729, 732 (2d Cir. 1998). "Where a criminal defendant has procedurally forfeited his claim by failing to raise it on direct review, the claim may be raised in a § 2255 motion only if the defendant can demonstrate either: (1) cause for failing to raise the issue, and prejudice resulting therefrom; or (2) actual innocence." Id. (citing *Douglas v. United States*, 13 F.3d 43, 46 (2d Cir. 1993)); *see, Bousley*, 523 U.S. at 622.

a. Cause and Prejudice

From a procedural standpoint, this case is no different than those cases in which defendants sought collateral review of their convictions under 18 U.S.C. § 924(c) after the United States Supreme Court decided in *Bailey v. United States*, 516 U.S. 137 (1995), that "use of a firearm under 18 U.S.C. § 924(c) requires "active employment" of the firearm. *See, Bousley*, supra; *Rosario*, supra; *De Jesus v. United States*, 161 F.3d 99 (2d Cir. 1998). Like the defendants in *Bousley* and *Rosario*, Petitioner pled guilty and did not challenge the validity of his plea on appeal. *See, Bousley*, 523 U.S. at 617' *Rosario*, 164 F.3d at 732. The *Bousley* defendant contended, similar to Petitioner, that: (1) "the legal basis for his claim was not reasonably available to counsel at the time his plea was entered," and (2) "before *Bailey*, any attempt to attack [his] guilty plea would have been futile." *Bousely*, 523 U.S. 622 (internal quotations omitted).

The Supreme Court rejected Bousley's argument that *Bailey* constituted cause or prejudice for failing to appeal, noting that "at the time of [movant's] plea, the Federal Reporters were replete with cases involving challenges to the notion that 'use' is synonymous with mere 'possession.'" Id. at 623. "The Court also rejected the fundamental premise that it would have been futile to raise the claim before *Bailey*, reasoning that futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time." *Rosario*. 164 F/3d at 732 (quoting *Bousley* at 623) (internal quotation marks omitted); *see, De Jesus*, 161 F.3d at 102-03.

Here, the fundamental arguments currently raised were available to the Petitioner at the time of his plea and could have been raised on direct appeal. Indeed, *Cleveland* (which is discussed below) did not chart new waters in the Second Circuit. In *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991), the Second Circuit held that an u]nissued export license in the hands of the government is not property, but instead an instrument of regulation unprotected by the mail and wire fraud statutes. *Schwartz*, 924 F.2d at 416-17. Further, the fundamental arguments which Petitioner relies upon for application of the Revenue Rule existed at the time of his plea. *See, United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, 519 U.S. 905 (1996). Finally, Petitioner cites no change in law regarding his assertion of extra-territorial prosecution, but rather the elements of the argument existed before his conviction. *See, United States v. Bowman*, 260 U.S. 94, 98 (1922) ("Crimes against private individuals or their property, like . . . larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the

territorial jurisdiction of the government where it may properly exercise it."). Consequently, Petitioner can demonstrate no cause for failing to raise the arguments on direct appeal.

b. Actual Innocence

"The Supreme Court in *Bousley* also made clear that when a habeas petitioner is required to meet the 'actual innocence' standard, he must satisfy a higher hurdle than the 'prejudice' prong of the cause and prejudice standard." *De Jesus*, 161 F.3d at 103. The *Bousely*, *De Jesus* and *Rosario* courts all held that none of the defendants could establish "actual innocence" because, in order to do so, the movant needed "to demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousely*, 523 U.S. at 623 (internal quotation marks omitted). This requires a showing of "factual innocence, not mere legal insufficiency." Id. In *Rosario*, for instance, none of the defendants could establish factual innocence because the recitals of their pleas supported their convictions under *Bailey's* definition of "use" of a firearm either individually or under a *Pinkerton* theory of liability. *Rosario*, 164 F.3d at 734-36 (citing *Pinkerton v. United States*, 328 U.S. (1946). The same result is obtained here.

At his plea, Petitioner admitted his participation in money-laundering conspiracy violating 18 U.S.C. § 1956(a)(1)(A) and (h), with the predicate acts of wire fraud. While Petitioner stated that he himself did not defraud the United States Government, his plea did not exclude the fact that other members of the conspiracy defrauded the United States Government. In fact, other defendants pleaded guilty to charges stemming from the

same scheme which alleged conduct that had the effect of depriving the United States Government from assessing or collecting taxes due on the underlying transactions. *See,* 26 U.S.C. § 5111; 26 U.S.C. § 6050I; 31 U.S.C. §§ 5313(a); *United States v. White*, 237 F.3d 170 (2d Cir.2001); Miller plead guilty to Count Three of the underlying indictment. Counts two, three and five of that indictment charge money-laundering conspiracies violating 18 U.S.C. § 1956(a)(1)(A) and (h), and were all based upon the alleged money-laundering agreement and smuggling operation described above. *See, Miller*, 26 F.Supp.2d at 419. *United States v. Miller*, 7 Fed.Appx. 59, 2001 WL 300536 (2d Cir. 2001) (unpublished decision). Miller plead guilty to Count Three of the underlying indictment. Counts two, three and five of that indictment charge money-laundering conspiracies violating 18 U.S.C. § 1956(a)(1)(A) and (h), and were all based upon the alleged money-laundering agreement and smuggling operation described above. *See, Miller*, 26 F.Supp.2d at 419. Therefore, "[a] reasonable jury could find that, under a *Pinkerton* theory of liability, the facts admitted by the [co-defendants] at their plea allocutions support the criminal liability of" Petitioner for violating 18 U.S.C. § 1956(a)(1)(A) and (h), with the predicate acts of wire fraud (citing, *inter alia, Pinkerton*, supra). Consequently, even assuming, *arguendo*, that Petitioner's current Revenue Rule argument is applicable to the instant case, it affords him no relief because he is not actually innocent of the crime.

Further, Petitioner's *Cleveland* and extra-territorial prosecution arguments are without merit, as discussed *infra*, and therefore he is not "actually innocent" of the crime under the facts that he did admit.

c. Ineffective Assistance of Counsel

Despite the above, "[a] defendant is generally permitted to raise an ineffective assistance claim in a collateral attack, even when the claim was not raised on direct appeal." *See, Amiel v. United States*, 209 F.3d at 195, 198 (2d Cir. 2000); *see, Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (ineffective assistance can establish cause for a procedural default only if it is itself an independent constitutional claim); *Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993) (procedural bar doctrine does not generally apply to claims for ineffective assistance of counsel) superceded by statute on other grounds as noted in *Triestman v. United States*, 124 F.3d 361, 369 n. 8 (2d Cir. 1997)).

To prevail on a claim of ineffective assistance of counsel, petitioner must prove: "(1) counsel's conduct 'fell below and objective standard of reasonableness,' and (2) this incompetence caused prejudice to . . . defendant." *United States v. Guevara*, 277 F.3d 111, 127 (2d Cir. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). However, a lawyer is presumed to be competent, and "the burden rests on the accused to demonstrate a constitutional violation." *United States v. Cronic*, 466 U.S. 648, 658 (1984). "Prejudice under Strickland requires a showing by the defendant that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Guevara*, 277 F.3d at 127 (quoting *Strickland*, 466 U.S. at 694). If the Court were to determine that Petitioner's *Cleveland* argument is meritorious and existed previously but was not raised on appeal, he could make out a claim for constitutionally ineffective assistance of counsel. *See, Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

C. Money Laundering & Wire Fraud Statutes

In order to obtain a conviction under 18 U.S.C. § 1956(a)(1) and (h) in this case, "[i]t was . . . necessary for the government to show that the scheme of which the [defendant] used the proceeds or intended to promote actually was an illegal wire-fraud scheme." *United States v. Pierce*, 224 F.3d 158, 165 (2d Cir. 2000). Therefore, although not directly charged with committing or conspiring to commit wire fraud under Section 1343, the Government had to present proof beyond a reasonable doubt that the defendants violated the wire fraud statute. *See, Pierce*, 224 F.3d at 162. The elements of wire fraud under 18 U.S.C. § 1343 are (i) a scheme to defraud; (ii) to get money or property; (iii) furthered by the use of interstate wires. Id. (Citations omitted).

Inasmuch as Petitioner's *Cleveland* and Revenue Rule arguments rely, in part, upon the rational and holdings of *Trapilo* and *Pierce*, the Court will start with an examination of these two decisions.

D. *Trapilo* and the Revenue Rule

The Revenue Rule is a "longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, 9 (Continued) Inc.*, 268 F.3d 103, 109 (2d Cir. 2001) (providing a detailed history of the revenue rule).

In *Trapilo*, the Second Circuit addressed the question of whether a scheme to defraud the Canadian Government of tax revenue under Section 1343 was prohibited by the Revenue Rule. *Trapilo*, 130 f.3d at 548.

The Second Circuit held that the Revenue Rule did not prohibit the prosecution and rejected the holding of the First Circuit Court of Appeals in *Boots*, supra, which came to the opposite conclusion in a similar situation. In *Boots*, three defendants were convicted, *inter alia*, of conspiracy to violate the federal wire fraud statute in connection with a scheme to transport tobacco into Canada without paying Canadian taxes and excise duties. *See, Boots*, 80 F.3d at 583-85. In rejecting the First Circuit's rational. As the First Circuit explained in *Boots*, the rationale for the Revenue Rule is that issues of foreign relations are assigned to, and better handled by, the legislative and executive branches of the government. *Boots*, 80 F.3d 587-88. The First Circuit reasoned that because it was foreclosed from passing on the validity of foreign revenue law, the court could not determine whether the defendants had violated the wire fraud statute. Id. the *Trapilo* court wrote:

> [A]s the [wire fraud] statute plainly states, what is proscribed is use of the telecommunication systems of the United States in furtherance of a scheme whereby one *intends* to defraud another of property. Nothing more is required. The identity and location of the victim, and the success of the scheme, are irrelevant.
>
> * * *
>
> The statute reaches *any* scheme to defraud involving money or property, whether the scheme seeks to undermine a sovereign's right to impose taxes, or involves foreign victims and governments.

Trapilo, 130 F.3d at 552 (emphasis in original).

Consequently, the Second Circuit concluded that "there is no obligation to pass on the validity of Canadian revenue law, and the common law revenue rule is not properly implicated." Id. at 553.

E. *Pierce and the "right to property."*

The *Trapilo* case was remanded to the district court and reassigned to the undersigned. Two defendants, the Pierces, were convicted after a bench trial. The convictions were later reversed by the Second Circuit because "[t]he government did not elicit proof at trial that the Canadian government imposes duty or taxes on such importation or sale of liquor." *United States v. Pierce*, 224 F.3d at 160. In reaching this conclusion, the Second Circuit noted that:

> [t]he Pierces were accused of "wronging" the Canadian government by tricking or deceiving it, not to obtain money from it, but to deprive it of its right to collect money in tax and duty revenue. That makes this appeal somewhat unusual. The Pierces are not accused of scheming to defraud the Canadian government of its property, but of its *right* to obtain property, its *right* to be paid money. To prove the existence of a scheme to defraud the Canadian government the prosecution had to prove the existence of such a right. Without it there was no "money or property" of which the Canadian government could be defrauded.

Pierce, 224 F.3d at 165-66 (italics in original, underscoring added).

As will be discussed below, Petitioner seizes upon the phrase "*right* to obtain property" from *Pierce* to analogize his case with the property in issue in *Cleveland* (discussed next), and to argue that a determination of whether the defendant deprived Canada of the "right to property" requires an analysis of the underlying statute which in turn implicates the Revenue Rule under the rational of *R.J. Reynolds* (discussed *infra*).

F. Cleveland and property rights

In *Cleveland v. United States,* 531 U.S. 12 (2000), the Supreme Court determined that an unissued video poker license held by a state did not constitute property and therefore could not be the basis of a mail fraud conviction. Id. at 20. In this regard, the Supreme Court held that: "[i]t does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Cleveland*, 531 U.S. at 15.

Citing to this statement in *Cleveland*, Petitioner argues that the Canadian Government's *right* to obtain tax or duty revenue - which *Pierce* recognized was an element of a nearly-identical prosecution - is *not* "property in the hands of the victim" and therefore is not "property" within the meaning of the wire fraud statute. Petitioner contends that the interests in both *Cleveland* and *Pierce* are merely future possessory interests in property which, according to *Cleveland*, is insufficient to support a mail or wire fraud conviction. However, despite the inviting parallels between the wording of the two decisions, Petitioner's reliance on *Cleveland* and *Pierce* to characterize the nature of the "property" at issue in this case is misplaced.

The unissued video poker license in *Cleveland* was never capable of becoming property in the hands of the government - the alleged victim of the mail fraud scheme - and therefore a scheme which deprived the government of the license could not be the predicate for a mail fraud conviction. *Cleveland* at 20; *see, United States v. Pasquantino*, 305 F.3d 291, 295 (4th Cir. 2002) (decision vacated pending rehearing *en banc*). By contrast, the unpaid taxes or duties in issue in this case and *Pierce* were owed to the Canadian Government at the time the goods wee smuggled into Canada and therefore became property at this time. Indeed, "[i]t is well established that . . . a government has a property right in tax revenues when they accrue." *Pasquantino*, 305 F.3d at 295 (citing *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 566 (1950)).

Cleveland did nothing to change the nature or character or a government's property right arising from money it is owed by regulation or statute as addressed in *Manning*, supra, or of the United States Government's right to prosecute individuals who deprive a foreign government of this property. In fact, in *Cleveland* the Court specifically noted that the government "nowhere allege[d] that Cleveland defrauded the State of any money to which the state was entitled by law." *Cleveland*, 531 U.S. at 22.

While *Pierce's* description of the property right in interest sounds, upon superficial review, that it is merely a future possessor right unprotected by the wire fraud statute like the interest in *Cleveland*, a closer review within the context in which *Pierce* was decided disabuses this position. The wording in *Pierce* speaking of the "right to obtain property" followed *Trapilo*. In *Trapilo*, the Second Circuit held that the success of the scheme is

irrelevant and the relevant question is whether "one *intends* to defraud another of property." *Trapilo*, 130 F.3d at 552. *Pierce* merely pointed out that "[i]n the absence of any proof of such tax or duty, there was no such scheme to defraud." *Pierce*, 224 F.3d at 168. The choice of syntax is directed at whether the right to tax existed, not in defining the nature or character of the property within the meaning of the wire fraud statute. Therefore, *Pierce* did nothing to address or change the nature of the property at stake in this type of case, but only pointed out that the Government needed, as an element of a prosecution based upon the deprivation of this type of property, to demonstrate that the right to collect the taxes and duties existed at the time of the scheme and that the scheme was intended to deprive this right.

Finally, footnote 27 of the *R.J. Reynolds* decision does not represent a tacit adoption of *Cleveland* with regard to the nature of property arising when a government has a right to collect taxes. *See, R.J. Reynolds*, 268 F.3d at 124, n.7. Footnote 27 in *R.J. Reynolds* provides:

> In *Pierce*, the defendants were "not accused of scheming to defraud the Canadian government of its property, but of its *right* to obtain property, its *right* to be paid money." *Pierce*, 224 F.3d at 165. The court assumed that such a right could constitute "property" for the purpose of RICO, *See* Id. at 165-66; *see also, Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 317 (7th Cir. 1985) (reluctantly allowing a state to pursue a RICO claim based on tax fraud). These decisions predate *Cleveland*

> *v United States*, 531 U.S. 12, 121 S.Ct. 365, 368, 148 L.Ed.2d 221 (2000), in which the Supreme Court held that an unissued video poker license held by the state did not constitute "property" for the purposes of the mail fraud statute. Given that we decide this case based on the revenue rule, it is unnecessary for us to visit the issue of what constitutes "property" under RICO in light of *Cleveland*. *R.J Reynolds*, 268 F.3d at 124, n.7. While Petitioner may gaze into the proverbial crystal ball and perceive that this footnote heralds a future reversal of the Circuit's view on property rights under the wire fraud statute, this Court is bound by current precedent.

Accordingly, the Court finds that Petitioner's argument based upon *Cleveland* regarding the nature of the property in issue is without merit. There was, and is, a legally cognizable basis supporting Petitioner's conviction in that he admitted to engaging in a scheme to defraud the Canadian Government of its right to collect taxes and duty - a sufficient property right, and that such a scheme was furthered by the use of interstate wires. The decision not to pursue this argument clearly "fell within the 'wide range of professionally competent assistance' required under the Sixth Amendment to the Federal Constitution." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Strickland*, 466 U.S. at 690). Further, based upon the above, the Petitioner cannot demonstrate that the result of the proceeding would have been different had counsel raised the issues on appeal.

G. *R.J. Reynolds*, the Revenue Rule revisited.

Petitioner's argument that *R.J. Reynolds* established a retreat from *Trapilo* such that the Revenue Rule now bars the prosecution is also flawed. The application of the Revenue Rule, or more precisely, its non-application, was addressed in *Trapilo*. The facts and circumstances of *Trapilo* are squarely on point with the instant case, and *R. J. Reynolds* provides no basis to waiver therefrom.

R.J. Reynolds stands for the proposition that the Revenue Rule prohibits a foreign government from enforcing a tax judgment through the use of a civil RICO action. Id. The majority in *R.J. Reynolds* found that "there is a critical difference between this civil suit brought by a foreign sovereign and the criminal actions previously considered by panels of this court" when applying the Revenue Rule. Id. at 106. The panel decision to which the *R.J. Reynolds'* majority refers are the *Trapilo* and *Pierce* decisions. Id. Therefore, contrary to Petitioner's assertion that *R.J. Reynolds* represents a recantation of the rule enunciated in *Trapilo*, the opposite is true. *See, R.J. Reynolds*, 268 F.3d at 124 ("Taken together, these two cases stand for the proposition that a scheme to defraud a foreign nation of its right to impose taxes may be punished under appropriate circumstances by the United States government, in United States courts, using United States penal laws. . .") The distinction turns on whether the right sought to be enforced requires a United States court to pass on the validity and application of a foreign revenue law. *R.J. Reynolds* held that, in a civil RICO case, it did. By contrast, *Trapilo* held that "[t]he intent to defraud does not hinge on whether or not the appellees were successful in violating Canadian revenue law . . ." and

therefore there was "no obligation to pass on the validity of Canadian revenue law, and the common law revenue rule [was] not properly implicated." *Trapilo*, 130 F.3d at 552-53.

Petitioner's argument mixes apples with oranges. The distinction between application or non-application of the Revenue Rule turns on the relief sought (e.g. civil damages in *R.J. Renolds* versus a criminal conviction in *Trapilo*. Judge Calabresi's dissent in *R.J. Reynolds* does not advocate that the Revenue Rule should be applied in criminal cases, but rather that it should not be applied in the criminal RiCO case. Id. at 135 ("Because I do not think the rule applies and because none of the possible rationales for the rule supports its extension to the facts in this case, I respectfully dissent."). His dissent does not provide Petitioner with any footing to attack *Trapilo* on this issue. not on the nature of the property at stake. *Pierce* offers no additional support to Petitioner's Revenue Rule argument. In *R.J. Reynolds* the *validity* of foreign revenue rule was implicated because the action sought damages which could only be calculated based upon the alleged violations of the foreign rule. Simply put, whether and to what degree the foreign revenue rule was violated is an integral element of the civil RICO action. By contrast, in *Pierce* and in the underlying criminal case here, there was no need to determine the *amount* of money the Canadian Government was deprived of by the scheme, or even whether the scheme was successful, in order to obtain conviction. Therefore, "unlike *Trapilo* and *Pierce*, [*R.J. Reynolds*] involve[d] a request for extraterritorial tax enforcement by a foreign sovereign" which, in turn, implicated the Revenue Rule. *R.J. Reynolds*, 268 F.3d at 124.

Therefore, the argument is without substantive

merit and does not constitute a basis for an ineffective assistance of counsel claim.

H. *Cleveland* and the Revenue Rule.

Petitioner also asserts that the *R.J. Reynolds* decision "cannot be reconciled with "*Cleveland*" in that the Second Circuit makes an "unsupportable distinction between civil and criminal actions regarding application of the revenue rule" contrary to *Cleveland*'s holding. This argument is fundamentally flawed because *Cleveland* addressed property rights, not the Revenue Rule. Further, while the *Cleveland* Court did address the historical development of the mail fraud statute, it did not exclude foreign governments as potential victims under the statute.

I. Extra-Territorial enforcement

Finally, Petitioner's argument asserting that the prosecution is barred because an essential element of the crime occurred extra-territorially is factually flawed. The essential conduct element of Petitioner's conviction involved his money-laundering operation occurring at his currency exchange business in Hogansburg, New York, and the overall scheme to defraud which was planned and carried out in the United States by the use of this country's telecommunication system. The fact that the defrauded tax revenues could b "in the hands" of the victim only in Canada does establish extra-territorial enforcement of a criminal stature. As *Trapilo* teaches, "[t]he identity and location of the victim, and the success of the scheme are irrelevant." *Trapilo*, 130 F.3d at 552. Rather "what is proscribed is use of the telecommunication systems of the United States in furtherance of a scheme whereby one *intends* to defraud

another of property." Id. Therefore, whether the property could be "in hand" only in Canada is irrelevant to the crime. Consequently, there is no basis for an ineffective assistance of counsel claim in this regard.

J. Conclusion - Section 2255 Motion

In conclusion, the Court finds that (a) the wire fraud statute was violated by Petitioner's admitted conduct because the Canadian Government's right to collect tax revenue constituted property within the meaning of that statute; (b) *Cleveland* does not represent a change of law relative to Petitioner's prosecution; and (c) the Revenue Rule serves no more of a bar to Petitioner's conviction today than it did in November of 1998 when he pled guilty. Petitioner's counsel was not constitutionally ineffective for not raising these issues on direct appeal. Petitioner's claims are, therefore, procedurally barred.

K. Enlargement

On December 17, 2002, Petitioner filed a motion *pro se* seeking "enlargement pursuant to [Federal Rule of Appellate Procedure] 23(c), requesting that he "be released to home confinement . . . during the pendency of these proceedings." *See* dkt. 12. For the reasons that follow, this motion is denied.

While Rule 23(c) is clearly not applicable in the instant case. Rule 23(c) of the Federal Rules of Appellate Procedure provides:

(c) Release Pending Review of Decision Ordering Release.

While a decision ordering the release of a prisoner is under review, the prisoner must–unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise–be released on personal recognizance with or without surety. [a] district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody." *Ostrer v. United States,* 585 F.2d 594, 596 n. 1 (2d Cir. 1978) (cited with approval in *Mapp v. Reno*, 241 F.3d 221, 226 (2d 2001)); *see also, Defino v. Thomas*, 2003 WL 40502, * 2 (S.D.N.Y. Jan. 2, 2003) ("A federal court has the inherent power to grant bail to a habeas petitioner who is properly before it contesting the legality of his custody."), and such authority exists under Rule 23(b). Rule 23(b) of the Federal Rules of Appellate Procedure provides:

(b) Detention or Release Pending Review of Decision Not To Release.

While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

(1) detained in the custody from which release is sought;

(2) detained in other appropriate custody; or

(3) released on personal recognizance, with or without surety. The determination turns on whether the petitioner has made the showing required by Second Circuit case law for release on bail pending determination of a habeas petition. *Harris*

> *v. United States*, 1997 WL 272398, *1 (S.D.N.Y. May 21, 1997) (2255 application). Three factors are generally examined in determining the propriety of granting bail:
>
> (1) Are substantial claims set forth in the habeas corpus petition?
>
> (2) Is there a demonstrated likelihood that the petition will prevail?
>
> (3) Are there extraordinary circumstances attending the prisoner's situation which would require the grant in order to make the writ of habeas corpus effective, presumably if granted.
>
> In short, is this case different from other habeas corpus cases?

Defino, 2003 WL 40502, * 2 citations omitted).

The fact that a petitioner's "post-petition incarceration will have been without just basis if his petition eventually succeeds does not constitute an extraordinary circumstance entitled him to bail." *Harris v. United States*, 1997 WL 272398, *1 (quoting *Iuteri v. Nardoza*, 662 F.2d 159, 162 (2d Cir. 1981)). Rather, there must be a "demonstrated likelihood that the petition will prevail," based upon "claims of a substantial nature upon which the petitioner has a high probability of success," and demonstrating merits "that are more than slightly in petitioner's favor," so that "victory for petitioner can be predicted with confidence." *Richard v. Abrams*, 732 F.Supp. 24, 25 (S.D.N.Y. 1990) (citations and internal quotation marks omitted).

Here, as discussed above and based upon controlling authority directly on point, there is not an overwhelming likelihood that the Petitioner's claims would be successful even if not procedurally barred. While the Court is sympathetic to the troubles that members of Petitioner's family have encountered, those facts, standing alone, do not justify the relief requested. *See United States v. DelToro*, 405 F.Supp. 1163, 1165-66 (S.D.N.Y. 1975) (While sometimes a "prison sentence brings greater hardships to the offender's family than to the offender himself . . . it cannot be allowed to defeat a sentence such as this which, as already indicated, was imposed for the purposes of vindication and deterrence."). The request to enlarge Petitioner's sentence to home confinement is denied.

L. Certificate of Appealability

Petitioner also requests that the Court grant him a Certificate of Appealability pursuant to 28 U.S.C. § 2253. In this case, reasonable jurists could debate upon whether the petition should have been resolved in a different manner, or whether the issues presented deserve encouragement to proceed further. *See, Miller-El v. Cockrell*, – U.S. –, 123 S.Ct. 1029, 1039-1040 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (1000); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The majority on the panel decision in *Pasquantino* rejected the Second Circuit's conclusion reached in *Trapilo* regarding whether the Revenue Rule barred a prosecution such as in issue here, and instead adopted the First Circuit's rational determination in *Boots*. Indeed appellate jurists in the First Circuit in *Boots* and in the Fourth Circuit in *Pasquantino*, 305 F.3d at 295. have resolved the Revenue Rule issue in a manner contrary to the Second Circuit's determination in *Trapilo*. It should

be noted that Senior Circuit Judge Hamilton filed a sharp dissent in *Pasquantino* in which he disagreed with the majority's conclusion on the Revenue Rule issue, opining, instead, that *Trapilo* was correctly decided. Further, jurists could disagree as to whether an essential element of the charge - the intent to deprive a cognizable property right - was lacking in Petitioner's situation and thus whether *Cleveland* "redefined the substance of a violation and placed the conduct beyond the reach of punishment" thereby making collateral review available. See, *Peck v. United States*, 73 F.3d 1220, 1224 (2d Cir. 1995) ("when a case 'redefine[s] the substance of a . . . violation . . . [and] place[s] conduct beyond the reach of punishment,' collateral review is available.") (quoting *United States v. Loschiavo*, 531 F.2d 659, 666 (2d Cir. 1976)), vacated on reh'g, but aff'd on this issue, *Peck v. United States*, 106 F.3d 450, 1997 WL 33947, at *7 (2d Cir. 1997); *see, Triestman v. United States*, 124 F.3d 361, 378-379 (2d Cir. 1997) (holding that to read the AEDPA as denying a defendant the right to any collateral review of his actual innocence claim would raise "serious Eight Amendment and due process questions," although such collateral review may not be available under Section 2255). Therefore, reasonable jurist could disagree on: (1) whether the counsel was constitutionally ineffective for failing to pursue the Revenue Rule defense in light of Petitioner's assertion that he did not defraud the United States; and (2) whether the conviction was obtained without proof beyond a reasonable doubt of each element of the crime and therefore whether Petitioner is being unconstitutionally held. Consequently, I find that a certificate of appealability should be granted on these two issues. *See* 28 U.S.C. § 2253, as amended by the Antiterrorism and Effective Death Penalty Act of 1996.

III. CONCLUSION

For the foregoing reasons, Petitioner's motions pursuant to 28 U.S.C. § 2255 and Rule 23(c) of the Federal Rules of Appellate Procedure are **DENIED**. A Certificate of Appealability is granted as set forth herein.

IT IS SO ORDERED.

DATED: March 24, 2003

Hon. Thomas J. McAvoy
U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of June two thousand four.

Fountain, Docket No. 03-2188

Petitioner-Appellant

v.

U.S.A.

Respondent-Appellee.

A petition for rehearing panel rehearing and a petition for rehearing en banc having been filed herein by the Appellant John Fountain.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc

has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie,

Clerk

By: _____

Arthur M. Heiler
Senior Motion Attorney